Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
2001 Annual Access Tariff Filings	)	CC Docket No. 01-206

DIRECT CASE OF
MOULTRIE INDEPENDENT TELEPHONE COMPANY

1. Moultrie Independent Telephone Company ("MITCO") hereby submits its Direct Case in response to the Common Carrier Bureau's Designation Order regarding its 2001 annual access tariff filing.[1] In the Designation Order, the Bureau requests further explanations regarding MITCO's calculation of costs for the 2001 local switching rate element and regarding the increase in that rate element.

2. MITCO demonstrates that it correctly calculated its local switching rates under the federal jurisdictional separations rules and that an increase is warranted. In addition, MITCO provides a confidential copy of its access charge cost study as filed with the Commission (this cost study is labeled "As Filed"). This cost study and the corresponding discussion herein demonstrate that MITCO properly calculated its cost study consistent with the Commission's rules. MITCO also provides a confidential copy of the cost study that is prepared as requested by the Bureau (this study is labeled "Revised for FCC"). A comparison of these two cost studies shows clearly that, if the Commission were to accept the study revised as directed in the Designation Order, MITCO's access charges would increase from $0.0412 to $0.0971 per minute of use (assuming receipt of local

[1] 2001 Annual Access Tariff Filings, Order Designating Issues for Investigation, DA 01-2033, released Aug. 29, 2001.

switching support in both cases). This would be an undesirable result given the FCC's efforts to reduce access charges since passage of the Telecommunications Act of 1996 ("1996 Act").

I Factual Background

3. After reviewing the 1996 Act and the FCC's subsequent implementing orders, MITCO restructured itself to better compete with the telecommunications companies that were expected to enter its market. MITCO's management determined that it would be in the best interest of MITCO's rural consumers to reduce the company's investment in non-network assets. Thus, MITCO's regulated telephone company transferred ownership of its non-network assets (a building, equipment and vehicles) to an unregulated affiliate. MITCO subsequently leased the building space and work equipment it needed to provide telecommunications services. The transfer of assets was effectuated according to FCC rules, and the leasing terms were established to achieve revenue neutrality in order to hold customers' rates at a reasonable level and, in fact, MITCO has been able to maintain a relatively stable level on all its service rates for five years. This is true despite the rising costs of overhead expenses and the increasing costs (*e.g.*, consulting and legal fees) associated with meeting growing state and federal regulatory administration obligations under the Communications Act, as amended.

4. The National Exchange Carrier Association ("NECA") requires telephone companies that receive high-cost support and carrier common line funding through the NECA pooling mechanisms to report their costs on an annual basis. MITCO's 1997 cost study accurately reflected the transactions between MITCO's regulated telephone company and its unregulated affiliate. The cost study and MITCO's records of the sale and lease of the assets were in accordance with the FCC's Part 32 (Uniform System of Accounts) rules. NECA rejected the cost study submitted by MITCO in 1997 and similarly rejected its 1998, 1999 and 2000 cost studies.

5. NECA believes that the cost studies must include the assets transferred to the affiliate as if they had not been transferred and must exclude the lease payments to the affiliate as if

they had not been paid.[2] Consequently, NECA continues to use MITCO's 1996 cost study as the basis for the calculations of MITCO's carrier common line and universal service fund amounts for the affected years. Further, in April of this year, NECA notified MITCO that it intends to suspend payments to MITCO altogether unless MITCO submits cost studies adjusted as requested by NECA.[3] The withholding of support funds has been and continues to be detrimental to MITCO. Nevertheless, MITCO did not calculate its local switching rates in the subject tariff filing to make up for the loss of these support funds; instead, MITCO's cost consultant prepared MITCO's prospective 2001 tariff filing according to current FCC rules.

6. As noted in the Bureau's Designation Order, MITCO filed a petition for declaratory ruling on the subject of NECA's downward adjustment to MITCO's universal service support based on MITCO's sale and lease of the referenced facilities. That petition raised the critical issue of whether the Commission has the legal authority to require incumbent local exchange carriers to own, rather than lease, the facilities they use to provide telecommunications service. MITCO makes clear in that proceeding that its sale and lease transactions were and are a sound exercise of management discretion with clear public interest and ratemaking benefits inuring to its subscribers. As discussed below, that petition remains pending before the Commission. This pleading and the accompanying confidential attachments are submitted without prejudice to MITCO's legal positions in the declaratory ruling proceeding.

7. In this tariff proceeding, the Bureau seems to be predisposed toward a position espoused by NECA in a letter it sent to a former chief of the Common Carrier Bureau in which NECA asked for clarification of the Part 36 rules regarding affiliate leases. In that letter, NECA gave the Bureau only part of the story. NECA crafted its letter so that it addressed only one of the rules called into question by MITCO's sale and lease of facilities. Observing procedural fairness,

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[2] Memorandum from Roberta Alvir, NECA, to Larry Van Ruler, Independent Telecommunications Consultants, Inc.; Steve Bowers, Moultrie; and John Boehm, NECA, dated March 12, 1999.

[3] Letter from Richard Snopkowski, NECA, to Steven Bowers, Moultrie, dated April 6, 2001.

MITCO served NECA with a copy of its petition for declaratory ruling regarding these issues. Despite the fact that NECA knew of the petition, NECA did not notify or serve MITCO when NECA filed its letter with the Bureau staff. The exclusion of Moultrie from deliberations on this dispute was designed to obtain from the Bureau a "rubber stamp" approval of NECA's actions. The Bureau's response thus was obtained in violation of the Commission's long-standing *ex parte* rules.[4] Consequently, the Bureau's letter ruling was flawed and cannot now be relied on by the Bureau in this tariff proceeding.

II MITCO Correctly Calculated its Costs in the Cost Study it Submitted for the 2001 Tariff Filing.

8. The Bureau's Designation Order states that, if MITCO correctly calculated its costs in its 2001 annual access cost study, then it should receive universal service support from the Universal Service Administrative Company ("USAC") and its local switching rates should be reduced. Designation Order at para. 7. The order also directs MITCO to provide a detailed explanation of why it is appropriate for it to increase its local switching rate to recover from ratepayers any amount of USF support that it is not receiving due to the dispute over its affiliate sale/lease-back transaction. *Id*. at para. 8.

9. MITCO's cost consultant, in is preparation of MITCO's 2001 cost study at issue here, rigorously followed the FCC's rules in developing the cost study. Key among these access charge rules is section 69.106(b), which states as follows:

> (b) The per minute charge described in paragraph (a) shall be computed by dividing the projected annual revenue requirement for the Local Switching Element, excluding any local switching support received by the carrier pursuant to Section 54.301 of this chapter, by the projected annual access minutes of use for all interstate or foreign services that use local exchange switching facilities.[5]

10. Calculations for purposes of the access charge filing in question -- year 2001 -- are required to be made on the basis of projected revenue requirements, rather than on a historical basis.

[4] 47 C.F.R. § 1.200 - 1.1216.

[5] 47 C.F.R. 69.106(b).

Since the calculations of the revenue requirements are made on a projected basis, it is necessary to match projected revenues with projected expenses for the year in question, in accordance with the matching principle under generally accepted accounting principles. Under this matching principle, MITCO has received no local switching support for 2001 and none is expected, depending on the outcome of the pending petition for declaratory ruling. If, on the other hand, MITCO had filed a revenue requirement based on historical test years 1999 and 2000, then taking the historical local switching support payments made in 1999 and 2000 would have been appropriate pursuant to the matching principle.

11. The lack of an ownership-neutral universal service methodology creates a discriminatory business environment. An ownership-neutral universal service methodology would tie the various universal service funds into one fund, and give each service provider an equal opportunity to recover its high costs from that one fund. Instead, the current multiple fund methodology is tied to the jurisdictional separations procedures and imposes requirements that rely on conditions having no apparent basis in law, and that are not applicable in a competitive scenario. Moultrie is aware that in the FCC's Docket 96-45, a cost separations model was proposed that, had it been adopted, could have eliminated this discriminatory treatment, as well as many other costing issues currently faced by the FCC.[6] In other words, if the FCC had adopted an ownership-neutral methodology in that docket, it would have resolved the facilities ownership versus facilities lease issue. Under such a system, there would be no difference in the separations treatment of facilities regardless of whether a service provider owned or leased facilities; and there should be no difference as the process should be transparent with respect to facilities ownership or lease status.

12. The revenues received from subscribers, plus support received for the local loop and any universal service support should combine to fully satisfy the carrier's revenue requirements for providing service to its customers. The interstate revenue calculation and the support fund

[6] ITCs, "White Paper on the Per Minute of Use Universal Service Plan," CC Docket No. 96-45, filed June 24, 1996.

calculations for universal service and local loop support should be set to provide equitable compensation, regardless of whether a carrier owns or leases facilities. With the current cost study procedures for the universal service support calculation and the local switching support calculation, there is a difference in calculated revenue requirements based on whether plant is owned or leased and the relationship of each type of plant to the other types of plant.

III MITCO Correctly Determined its Interstate Local Switching Rate in its Annual Access Filing for 2001.

13. The Bureau's Order requested that MITCO provide data explaining how it determined its interstate local switching rate, including all the elements used to calculate the revenue requirement and its usage estimates. Designation Order at para. 8.

14. The MITCO interstate local switching rate was calculated pursuant to 47 C.F.R. Part 36 Jurisdictional Separations Procedures and Part 69 Access Charge rules. Pursuant to 36.125 (f) the frozen interstate 1996 Dial Equipment Minutes ("DEM") factor of .164582 was multiplied by a factor of two (for companies with less than 10,000 access lines) and pursuant to 36.125 (i) the frozen interstate 2000 DEM factor of .173590 was multiplied by a factor of one for a weighted interstate DEM of .502754. The frozen interstate DEM factor at year-end 2000 was the same as used in the estimated 2001 cost study pursuant to 36.125 (i). This section states as follows: "Effective July 1, 2001, through June 30, 2006, all study areas shall apportion costs in Category 3, Local Switching Equipment, among the jurisdictions using relative dial equipment minutes of use for the twelve month period ending December 31, 2000."[7]

15. The minutes used in calculating the rates were explained in MITCO's Description and Justification provided at the time of this tariff filing. The interstate minutes of use were 2,429,868 for 1999, and 2,107,466 for 2000. For the years 1999 and 2000, respectively, the difference in the minutes of use results in 1,902,350 and 1,961,732 minutes. The calculated

[7] 47 C.F.R. 36.125(i).

percentage increase is a result of dividing the 2000 minutes by the 1999 minutes, which yields an increase of 3.12%. This same increase is carried through to produce the projected 2001 minutes of use in the amount of 2,022,968 minutes.

15. The projected interstate revenue requirement for MITCO was calculated using the audited account balances on the books of the company for the year 2000 with no adjustments for increases in expenses, even after the company had reduced expenses from the year 1999 by approximately 14%.

IV The Increase in Local Switching Rates Would Recover Only the Revenue Requirement Associated with MITCO's Local Switching and Would Not Be Used to Compensate for any Loss of Universal Service Support for Other Elements

16. The Bureau's order directed MITCO to provide evidence demonstrating that the increase in switching rates would recover only MITCO's switching revenue requirement and would not be used to compensate for MITCO's loss of USF support for other network elements. Designation Order at para. 8.

17. The jurisdictional separation studies reflect the costs for providing service separated between the federal and state jurisdictions and the access charge study derives the costs of service allocated among rate elements. The increase in the switching rate filed pursuant to section 69.106 reflects the switching rate of MITCO based on no high-cost support receipts, either current or forecasted. This can be seen on Attachment 1, Interstate Part 69 Access Charge Output, Forecast 2001, page 1, at the line labeled "Tot Rev Requirement," and the column labeled "Local Switch."

18. The local switching revenue requirement is calculated independent of universal service funding. The revenue requirement used to calculate the local switching rate has no local switching support component because MITCO has not received any local switching support in 2001 and none is currently expected. Therefore, the rates were calculated pursuant to section 69.106(b). This calculation properly included the two times DEM weighing factor frozen in 1996. If the local switching revenue requirement had excluded DEM weighting from the calculation, then the rates would be different.

V It Is Unreasonable for the Commission To Require MITCO To Recalculate the Cost Study it Submitted to NECA While the MITCO Petition for Declaratory Ruling Remains Pending.

19. The Designation Order directs MITCO to submit a cost study recalculating its costs by including the property and related expenses with, and excluding the related rent expense from, its regulated telephone operations. Designation Order at para. 8.

20. MITCO provided the pertinent information in its jurisdictional cost studies and in the cost studies it submitted to NECA. MITCO submits herewith a copy of the cost study it submitted to NECA. In addition, MITCO provides an access charge study labeled "Revised for FCC," submitted under protest and without prejudice to its legal argument that maintains there is no legal authority to require an incumbent local exchange carrier to own rather than lease its property. These studies contain the information requested in the Designation Order and the revised study contains all of the changes requested. MITCO respectfully requests confidential treatment of these cost studies.

21. The petition for declaratory ruling filed by MITCO in March of 1999 has not been resolved. As MITCO demonstrates therein, there is no apparent basis in the Commission's authorizing statute -- the Communications Act of 1934, as amended -- that allows it to require a telephone company to own the facilities with which it provides telecommunications services. The FCC and other regulatory agencies have simply imputed into the investment recovery rules of the regulated environment, the facilities ownership status inherent in the environment that existed prior to enactment of the Communications Act of 1934. This methodology proved to be convenient to investors and ratepayers so long as the market was monopolistic. However, this methodology is not sustainable in a competitive environment, especially since support funding is portable. Astute managers of regulated companies must employ tactics intended to mitigate negative effects. Regulators should recognize their efforts as the product of fiduciary responsibilities incumbent upon managers directed by stockholders to maintain the highest value for their respective investments.

22. MITCO's substantive petition on the lease issues remains pending before the Commission. The Commission and the Bureau staff are impeding MITCO's efforts to remain competitive by not taking timely action to resolve this petition despite MITCO's repeated efforts to pursue its petition. MITCO filed the petition in March of 1999. On February 28, 2000, when the petition still had not been placed on public notice, MITCO representatives met with staff of the Bureau who assured these representatives that the petition would be assigned to staff and set for public comment. On December 1, 2000, MITCO representatives again met with staff to address any questions the staff had relative to the substance of the aging petition.[8] MITCO also provided additional information to the Bureau by letters dated October 31 and December 29, 2000. Bureau staff assured MITCO that the matter would be assigned to staff and that the petition would be placed on notice for public comment.

23. Until the Commission resolves the legal issues that are the subject of the pending petition, the Commission appears to have no legal basis upon which it can require MITCO to recalculate and refile its cost study for 2001. A resolution of MITCO's Petition is a prerequisite to an order directing MITCO to recalculate its 2001 cost study.

24. Furthermore, MITCO has been and continues to be concerned that if it were to submit cost studies based on data that do not accurately reflect the sale and lease of facilities that occurred in 1997, principals of MITCO could be held criminally liable under Title 18, section 1001 of the United States Code. MITCO has notified NECA of its objections several times, most recently in a letter dated May 10, 2001.[9] If MITCO were to prepare the cost studies as requested by the Designation Order, those cost studies would be materially false, leaving MITCO's management open to a potential charge of violating the federal law which prohibits individuals from submitting false, fictitious and fraudulent information to government agencies.

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[8] Letter from David A. Irwin, Irwin Campbell & Tannenwald, PC, to Magalie Salas, FCC, dated February 29, 2000.

[9] Letter from David A Irwin, Irwin Campbell & Tannenwald, PC, to Richard Snopkowski, NECA, date May 10, 2001.

25. Section 1001 of Title 18 of the US Code provides, in pertinent part, that whoever knowingly and willfully makes or uses any false writing or document, knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, shall be fined under this title or imprisoned not more than five years, or both.[10] Criminal prosecutions brought under 18 U.S.C. section 1001 require the showing of several elements, including (1) the willful and knowing submission of information; (2) that is materially false; and (3) is submitted in a matter within the jurisdiction of a federal agency. Judicial decisions made under section 1001 show that a person may be held liable for a violation of section 1001 even when there is no intent to defraud or deceive the government.[11]

26. Also, prosecution can result even if the information is not submitted directly to the federal government agency but, for example, to NECA.[12] Furthermore, case law does not require that the false statement be relied on by the federal agency for the information to be characterized as "material." Instead, a statement must have had only the "natural tendency to influence, or have been capable of influencing, the agency."[13] The cost study at issue here unquestionably would be material, as it will be used in making a determination of MITCO's receipts from the carrier pools. As a result of MITCO's potential liability for prosecution under section 1001 of Title 18, MITCO submits, under protest and with request for confidential treatment, the cost studies requested in the Designation Order.

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[10] 18 U.S.C. § 1001.

[11] *United States v. Beck*, 615 F.3d 441, 453 (7th Cir. 1980) ("knowledge of the falsity of the statement is sufficient, by itself, to satisfy the *mens rea* [knowledge] requirement of section 1001.")

[12] *See e.g. United States v. Yermian*, 468 U.S. 63 (1984) (government need not prove that the defendant was aware that a false statement would affect a federal entity).

[13] *United States v. Dick*, 744 F.2d 546, 553 (7th Cir. 1984).

27. A comparison of the cost studies marked "As Filed" and "Revised for FCC" shows that, if MITCO's cost study were adopted as filed, the local switching rate would be considerably lower than if the revised study were adopted and filed, assuming in both cases that funding of local switching support were received. In other words, if MITCO's filed cost study is rejected and the FCC requires instead the cost study revised per instructions in the Designation Order, MITCO's access charges would increase from $0.0412 ("As Filed") to $0.0971 ("Revised for FCC") per minute of use.

28. The Designation Order directs MITCO to provide its cost studies for the three years prior to its entering into the sale and lease arrangement with its affiliate. Designation Order at para. 8. MITCO provides herewith a confidential copy of its cost studies as submitted to NECA for 1994, 1995 and 1996. MITCO has labeled these cost studies as "Confidential" and hereby requests confidential treatment of those documents.[14]

29. Finally, the Bureau asks MITCO to calculate the USF local switching support to which it would be entitled under this revised cost study, and to recalculate its proposed local switching rate after taking into account this support. Designation Order at para. 8. MITCO submits herewith an access cost study revised as requested by the Designation Order. It is labeled "Confidential" and MITCO requests confidential treatment of the cost study and its contents. The revised local switching support amount can be found on Attachment 2, Interstate Part 69 Access Charge Output, Revised for FCC, at the line labeled "Projected Local Switching Support."

VI Conclusion

30. In view of the foregoing, MITCO urges the Commission to determine that MITCO correctly calculated its local switching rate for purposes of the 2001 annual access tariff filing. If this cost study were accepted, an increase in the local switching rate would be warranted. On the other hand, if the Commission accepts MITCO's position as stated in its declaratory ruling petition,

[14] These documents are labeled as Attachment 4 (1994), Attachment 5 (1995) and Attachment 6 (1996).

the increase in MITCO's local switching rate would not be necessary to meet MITCO's revenue requirement and MITCO would be in a position to withdraw its proposed increase of the local switching rate.

Respectfully Submitted,

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CONFIDENTIAL COST STUDIES HAVE BEEN OMITTED FROM THIS PUBLICLY-FILED PLEADING

ATTACHMENT 1:

Interstate Part 69 Access Charge Output,

Forecast 2001; "As Filed"

ATTACHMENT 2:

Interstate Part 69 Access Charge Output,

Forecast 2001, "Revised for FCC"

ATTACHMENT 3:

Local Switching Support Data Collection Form,

Data Period 2000

ATTACHMENT 4:

Part 36 Interstate Access Cost Study for 1994

ATTACHMENT 5:

Part 36 Interstate Access Cost Study for 1995

ATTACHMENT 6:

Part 36 Interstate Access Cost Study for 1996